78-1227

In the Supreme Court of the United States

No. 78-.....

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

vs.

PERRY L. DAVIS and BURMA L. DAVIS, his wife,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

For the convenience of the Court and in the interest of brevity the Petitioner, Ellis National Bank of Tallahassee, a National Banking corporation, will be referred to in this Petition as the Bank. The Respondents, Perry L. Davis and Burma L. Davis, his wife, will be referred to jointly as Davis.

OPINIONS AND ORDERS SOUGHT TO BE REVIEWED

This case originated in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, and ended there in a Final Judgment dated July 11, 1977. A copy of that Final Judgment is attached to this Petition as Exhibit "A". Petitioner took a timely appeal to the District Court of Appeal of Florida, First District, which affirmed in part and reversed in part in an Opinion appearing at 359 So. 2d 466. The original Opinion is dated April 28, 1978 and rehearing was denied by separate Opinion dated June 23, 1978. A copy of the Opinion of the District Court of Appeal of Florida, First District, is attached hereto as Exhibit "B". Petitioner then filed a timely Petition for Certiorari in the Supreme Court of Florida and the Supreme Court of Florida denied Certiorari without Opinion in an Order dated Thursday, November 9, 1978, which is as yet unreported. A copy of the denial of Certiorari by the Florida Supreme Court is attached hereto as Exhibit "C". It is the final Appellate Order of the District Court of Appeal of Florida, First District, which Petitioner seeks to have reviewed in the Supreme Court of the United States of America by this Petition for Certiorari.

JURISDICTIONAL GROUNDS FOR PETITION FOR CERTIORARI

The District Court of Appeal of Florida, First District, in its Opinion at 359 So. 2d 466, directly ruled on the application of a Federal Statute to a National Bank. Specifically, the Court ruled on the interpretation of Title

12, United States Code Annotated, Section 86, and ruled that in a case in which a bank had received three installment payments of interest on a loan which were deemed to be usurious because the rate being charged was the maximum statutory rate allowed in Florida of ten per cent (10%) and the computations were based on a daily rate of interest computed by using a 360 day year rather than a 365 day year, the penalty provided by Title 12, USCA, Section 86, was repayment by the Bank to Davis of double the entire interest paid throughout the history of the loan. The District Court of Appeal of Florida, First District, concedes in its Opinion that it interprets Title 12, USCA, Section 86, differently from the only Federal decision of which counsel for the Petitioner is aware, *Cronkleton* v. *Hall*, 66 F. 2d 384 (8th Cir. 1933). Specifically, as the Court states on page 470 of its Opinion:

> "Further, we are aware that Cronkleton v. Hall, supra, which was not cited by either party but was discovered by our own research, lends a construction to the subject federal statute different from that which we have applied sub judice. However we have found no other case construing the statute in the manner as did the Cronkleton Court and that Court's construction does not appear to us to be in keeping with the plain meaning of the words of the Statute itself; nor does its reasoning comport with the interpretation given by our own Courts to our own statute which contains a similar provision." 359 So. 2d at 470, 471.

It is Petitioner's contention that jurisdiction exists in the Supreme Court of the United States to review the decision of the District Court of Appeal of Florida, First District, pursuant to Title 28, USCA, Section 1257(3), providing as follows:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*"

This Court has on several occasions reviewed decisions of state courts involving national banks and interpreting federal banking statutes, e.g., *Yates* v. *Jones National Bank,* (1907) 27 S. Ct. 638, 206 U.S. 158, 51 L. ed. 1002; *First National Bank of Grand Forks, North Dakota* v. *Anderson,* (1899) 19 S. Ct. 284, 172 U.S. 573, 43 L. ed. 558; *Seabury* v. *Green,* (1935) 55 S. Ct. 373, 294 U.S. 165, 79 L. ed. 834; *McCollum* v. *Hamilton National Bank of Chattanooga,* (1938) 303 U.S. 245, 82 L. ed. 819.

In *First National Bank of Lake Benton* v. *Watt,* (1902) 184 U.S. 151, 22 S. Ct. 457, 46 L. ed. 475, this Court reviewed a decision of the Supreme Court of the State of Minnesota interpreting the very statute in question in the case at bar, Title 12, USCA, Section 86. Petitioner submits that the Court clearly has jurisdiction to review the decision of the District Court of Appeal of Florida, First District, by Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is the interpretation of the penalty provision of Title 12, USCA, Section 86. The District Court of Appeal of Florida, First District, has held that that Statute requires the Bank in connection with a loan which was admittedly not usurious from its inception, to pay as a penalty, not only double the payments which were found to be usurious, but double the entire interest collected throughout the period of the loan, of which only three payments were tainted with usury. The Court, in its Opinion, admits that its decision is in conflict with the only Federal decision interpreting the penalty provision of that Statute, *Cronkleton* v. *Hall,* supra.

FEDERAL STATUTE INVOLVED

The Federal Statute which was interpreted by the District Court of Appeal of Florida, First District, and under which the Bank contended that its penalty was limited to double the total interest paid on the three payments tainted by usury, is Title 12, USCA, Section 86, which reads as follows:

"Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by

whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. R.S. §5198."

STATEMENT OF THE CASE AND FACTS

The Bank is the successor to The Parkway National Bank of Tallahassee, having changed its name to The Ellis National Bank when it was acquired by the Ellis National Banking Corporation, a Florida bank holding company. Parkway was founded in November of 1963 and from the time of its commencing business to the making of the loan in this case there existed a close working relationship between the Bank and The American National Bank of Jacksonville of which Perry L. Davis was a Senior Vice President. Approximately March 27, 1973, Mr. Davis by telephone requested a loan from the Bank and followed up this call with a letter request. The Bank approved the request and by letter of April 9, 1973, Davis forwarded to the Bank the note which he himself had prepared and which had then been executed by both Mr. and Mrs. Davis. Davis also sent to the Bank 930 shares of American Bank stock which was the agreed collateral for the loan. In the fifth line of the note the following words appear:

"With interest at the rate of ..... per cent per annum after date."

and up to the date of trial no figure had been inserted in that blank. Further down in the body of the note there appears line 11 which reads:

"(11) Annual Percentage Rate ~~7 1/2~~ ~~9.75~~ 10%."

The figures 7 1/2, 9.75 and 10 are written in ink as opposed to the rest of the completed blanks in the note and the first two figures, 7 1/2 and 9.75, have been lined through. It was testified at the trial of this case that the written-in figures were placed on the note by officers or employees of the bank.

Between April 12, 1973 and the time of trial, there had been a change in the structure of American Bank, which had become one of the American Banks of Florida group and accordingly, the American Bank stock had been exchanged for 7,951 shares of stock in American Banks of Florida and this was the collateral held by the Bank.

The Davis loan was set up on the Bank's books and it began to send notices to Davis for interest or principal and interest as these items fell due. The interest rate began at 7 1/2 per cent and gradually increased until it reached the statutory maximum of 10 per cent. The rate was testified to by Benson Skelton, CPA, who is the CPA for the Bank. Mr. Skelton also testified as to the method used by the Bank in computing interest which was the use of a 360-day year under the Rowlett's Tables for a time and a 365-day year beginning with the installment due September 23, 1974, and for all subsequent installments. The following table summarizes the testimony in this regard.

ELLIS NATIONAL BANK OF TALLAHASSEE

PERRY DAVIS NOTE # 17741

INTEREST		PRINCIPAL PAID	FACTOR	DAYS	RATE	AMOUNT COLLECTED	PRINCIPAL BALANCE
FROM	TO						
4/12/73	6/30/73	$ -0-	360	79	7 1/2	$1,234.38	$75,000.00
6/30/73	9/28/73	-0-	360	90	Various	1,665.11	75,000.00
9/28/73	12/31/73	-0-	360	94	10	*1,958.33	75,000.00
12/31/73	3/30/74	-0-	360	90	10	*1,875.00	75,000.00
3/30/74	4/24/74	7,500.00	360	25	10		67,500.00
4/24/74	6/25/74	-0-	360	62	10	*1,745.83	67,500.00
6/25/74	9/23/74	-0-	365	90	10	1,664.38	67,500.00
9/23/74	12/31/74	-0-	365	99	10	1,830.82	67,500.00
12/31/74	3/31/75	-0-	365	90	10	1,682.88	67,500.00
3/31/75	4/4/75	7,500.00		4	10		60,000.00
4/4/75	6/30/75	-0-	365	87	10	1,504.11	60,000.00
6/30/75	9/30/75	-0-	365	92	10	1,512.33	60,000.00
9/30/75	12/31/75	-0-	365	92	10	1,512.33	60,000.00
12/31/75	3/31/76	-0-	365	91	10	1,495.89	60,000.00
3/31/76	4/1/76	7,500.00	365	1	10		52,500.00
4/1/76	6/29/76	-0-	365	89	10	1,296.58	52,000.00
6/29/76	9/27/76	-0-	365	90	10	1,294.52	52,000.00

* The three usurious payments.

8.

Davis made all payments timely as they became due. On August 5, 1975, the Bank wrote a letter to Davis requesting that he deposit additional collateral with the Bank, the Bank being then concerned as to the value of the American Banks of Florida stock. This was followed by another letter on September 25, 1975, and on October 15, 1975, a letter from counsel for the Bank making demand that the collateral be increased. When Davis refused to deposit additional collateral the Bank brought suit on the note pursuant to the acceleration clause in the note. Davis filed his answer and defenses and a counterclaim contending that he had been charged a usurious rate of interest by reason of the three installments which were paid when the rate being charged by the Bank was 10 per cent and while the Bank was still using a 360-day year under the commonly used Rowlett's Tables.

A Pre-Trial Conference was held and a Pre-Trial Order entered. The parties also entered into a stipulation which appears verbatim in the Final Judgment entered by the Trial Court and attached hereto as Exhibit "A". The issues which were submitted to a Jury were resolved in favor of Davis and the Court thereupon, based on the Stipulation of the parties, entered the Final Judgment attached hereto as Exhibit "A".

Davis made three interest payments to the Bank when the rate being charged was 10 per cent and when the 360-day year was being used for computation. Those payments were made on December 31, 1973, March 30, 1974, and June 25, 1974, and they totaled $5,579.16. Had the Bank used the 365-day factor and the maximum rate of 10 per cent, the total of those three payments would have been $5,441.14, or a difference of $138.02. Based on that excess charge of $138.02, the District Court of Appeal of Florida, First District, in partially affirming and partially reversing

the Trial Court's Final Judgment, penalized the Bank the total sum of $47,277.86. The basis of that holding is a finding that the Bank was obligated to pay a penalty in the amount of twice the entire interest paid on the note throughout its history, in the face of uncontroverted evidence that only three of such payments were tainted by any hint of usury and when it is conceded that the loan was not usurious from its inception. It is this ruling of the District Court of Appeal which Petitioner seeks to have the United States Supreme Court review on certiorari.

ARGUMENT

The parties to this case stipulated among other things:

> "That other banks in the State of Florida have customarily and routinely used the 360-day factor applied to 365 days. That this factor is developed by the use of the 'Rowlett's Tables' which were customarily used by said banks and that such factor and tables were used when the maximum 10 per cent interest rate was being charged to borrowers from said banks."

A calendar year is, of course, composed of 365 days and the Rowlett's Tables referred to in the above stipulation are a set of tables developed by a man named Rowlett based on a mathematically simple 360-day year composed of twelve thirty day months. The purpose of the Tables was for ease of computation in the days before pocket computers and they were in use as early as 1825, the year before Florida became a State.

In the case at bar, Davis executed the note on April 12, 1973, and the Bank advanced the principal sum of $75,000.00. The blank in the note for the interest rate was not filled in but the Bank billed the first interest installment at the rate of 7 1/2 per cent using the 360-day year. The next installment which was paid on or about September 28, 1973, was computed at various different interest rates as the rate gradually inched upward. The rate charged by the Bank and paid by Davis reached the legal maximum of 10 per cent with the installment billed by the Bank and paid by Davis on December 31, 1973. That installment, as well as the installments paid on March 30, 1974, and June 25, 1974, were at the maximum rate of 10 per cent and computed using the 360-day year as described

in the Rowlett's Tables. All subsequent installments of interest were billed by the Bank and paid by Davis using a 365-day year and were not usurious. Thus, Davis paid a total of three installments on which the interest rate was slightly in excess of 10 per cent due to the use of the 360-day year. Those three payments totaled $5,579.16, and it is the Bank's contention that its only penalty, if any, under the Federal Statute involved is double that amount, or $11,158.32. The judgment of the District Court of Appeal of Florida, First District, penalizes the Bank in the sum of double the total interest paid on the note throughout of $23,638.93, or $47,277.86.

In the first place the Court's construction of the Statute is clearly erroneous. The pertinent sentence in the Statute reads as follows:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of debt, twice the amount of the interest *thus* paid from the Association taking or receiving the same . . ." [Emphasis supplied]

The word "thus" obviously refers back to "the greater rate of interest". Otherwise, the word "thus" is pure surplusage for if the Congress had intended to penalize a National Bank the entire interest paid, and not merely interest which was paid at a usurious rate, it could have simply left out the word "thus".

The Opinion of the District Court of Appeal of Florida, First District, recognizes that the construction of that Court is not in accord with the only Federal case which has ever interpreted that particular portion of the Statute. As the District Court of Appeal stated in its Opinion:

> "Further, we are aware that Cronkleton v. Hall, supra, which was not cited by either party but was discovered by our own research, lends a construction to the subject federal statute different from that which we have applied sub judice." 359 So. 2d at 470, 471.

Cronkleton v. *Hall*, (8th Cir. 1933) 66 F. 2d 384, is the only case counsel has been able to find which interprets that particular portion of the statute. That case clearly held that where the rate of interest payable to a national bank under an original loan contract is lawful or where no rate has been agreed to, the subsequent taking or receiving of interest in excess of the lawful rate, does not relate back so as to allow the right of recovery for double the amount of all prior interest payments. As headnote 9 of the case states:

> "In such case, the taking or receiving of interest in excess of legal amount would result only in forfeiture of entire interest not yet lawfully paid which was agreed to be paid or which contract carried with it, *and in right of action for recovery back of double the amount of all actual payments of interest which were in fact usurious.*" [Emphasis supplied]

The opinion in *Cronkleton* v. *Hall*, supra, concludes with the following:

> "As the Court does not find that a usurious contract was entered into between the parties in March of 1926, as the petition does not allege that the dealings between the parties were usurious in their inception, and does not allege usurious dealings before November 25, 1930, and as the findings of the Court clearly are that the usury commenced with the payment of November 25, 1930, the judgment of the District Court

is correct under the findings only as regards the payments of interest subsequent to November 25, 1930. The amount of these payments as appears by the finding was $2,183.70. The judgment is set aside, and the case is remanded to the trial court, with instructions to enter judgment for plaintiff for $4,367.40." 66 F. 2d at 388.

The holding in *Cronkleton* as applied to the case at bar would result in a penalty to be paid by the Bank in the amount of double the three interest installments paid by Davis which were usurious and no more.

Rule 19 of the Supreme Court Rules indicates one of the considerations of the Court in determining whether to grant Certiorari as follows:

> "Where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Petitioner respectfully submits that the District Court of Appeal of Florida, First District, has decided a Federal question of substance and has decided it in a manner contrary to the only reported Federal decision on the question which counsel has been able to find through diligent research. To the best of counsel's knowledge the Supreme Court has never considered the question.

There is another compelling reason why the Court should grant Certiorari in this case. As the parties have stipulated and as is common knowledge, Banks not only in Florida, but throughout the United States, have for some 150 years used the Rowlett's Tables and the 360-day year in computing interest. In today's economy when the prime rate of major New York City Banks is 11-3/4%

and the statutory maximum in most states for loans to individuals is 10%, there are surely many situations presently in existence in which banks and especially national banks, have made loans at the maximum statutory rate and using the Rowlett's Tables with the 360-day year. Thus, the decision of the District Court of Appeal of Florida, First District, if allowed to stand, could have devastating impact on national banks throughout the United States. Surely the intention of Title 12, USCA, Section 86, was not to penalize a national bank for a usurious overcharge of $138.02, the outrageous penalty of $47,277.86.

CONCLUSION

For the reasons stated above Petitioner respectfully urges the Court to grant this Petition for Writ of Certiorari and receive both briefs and oral arguments on the merits.

Respectfully submitted,

/s/ JULIUS F. PARKER, JR.
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P. O. Box 669—318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Petitioner, Ellis National Bank of Tallahassee

CERTIFICATE OF COUNSEL

I, JULIUS F. PARKER, JR. attorney for Ellis National Bank of Tallahassee, a National Banking corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of February, 1979, I served copies of the foregoing Petition for Certiorari on the several parties thereto as follows:

On Perry L. Davis and Burma L. Davis, his wife, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

Charles L. Franson, Esquire
Bryant, Dickens, Franson and Miller
P. O. Box 5774
Jacksonville, Florida 32207

/s/ JULIUS F. PARKER, JR.
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
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Tallahassee, Florida 32302
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APPENDIX

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO.: 75-2417

ELLIS NATIONAL BANK OF TALLAHASSEE, a National Banking corporation,
Plaintiff,
vs.
PERRY L. DAVIS
and
BURMA L. DAVIS, his wife,
Defendants.

FINAL JUDGMENT

The above entitled cause came on regularly for trial pursuant to Pre-Trial Conference Order which provided as follows:

"PRE-TRIAL CONFERENCE ORDER

This cause came on before the Court for pre-trial conference and the following Pre-Trial Conference Order is hereby entered by the Court.

The following issues in this cause are to be resolved at the trial, which is scheduled by the Court for 9:00 A.M. on February 7, 1977.

1. When the Plaintiff Bank made its demand for additional collateral on September 25, 1975, did it, in good faith, believe that prospect of payment of the note or performance of Defendant's obligations were impaired?

2. Was there an agreement between the Plaintiff and the Defendants as to the interest rate which would be charged upon the note which was given by the Defendants to the Plaintiff, and if so, what was that interest rate?

3. Did the fact that the bank calculated interest for a period of time using a 360 day factor applied to 365 days constitute usury when the interest rate during those periods of time was 10 percent?

4. Do the provisions of Section 687.01— 'In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 6 percent per annum, but parties may contract for a lesser or greater rate by contract in writing' preclude submission to the jury of Issue No. 2 or was this provision waived by the conduct of the parties?

The first two questions will be submitted to the jury with instructions that the jury enter a special verdict which shall be limited to answering questions one and two. Questions three and four will be ruled upon by the Court and the parties shall submit arguments on these questions to the Court after the jury retires and briefs are filed pursuant to order of the Court.

The Plaintiff having requested permission to file an amendment to its previous answer to the Defendant's counter claim, such request was granted and such amendment shall be filed and served on Defendant's counsel by February 2, 1977. If the amendment contains additional affirmative defenses the Defendant shall respond to such affirmative defenses if they desire by Friday, February 4, 1977.

The parties shall exchange final witness lists by February 3, 1977, and additionally, parties having stated to the Court that they have agreed upon introduction of certain Exhibits without objection, a copy of these exhibits together with an agreement of counsel shall also be submitted to the Court by Friday, February 4, 1977. The parties will have three preemptory challenges for their side.

After the jury enters the special verdict and the Court rules on questions three and four, the Court will enter a Final Judgment which will merely require certain mathematical computations.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 3rd day of February, A. D. 1977.

/s/ James E. Joanos
James E. Joanos
Circuit Judge"

With respect to Issue No. 1, the jury found for the Defendants.

With respect to Issues No. 2 and 4, the Court directed a verdict for Defendants.

With respect to Issue No. 3, the parties stipulated as to the facts to be considered by the Court as follows:

"STIPULATION

With reference to Issue #3 Contained in the Pre-Trial Conference Order. Plaintiff and Defendant stipulate and agree that the following facts are correct and shall be used by the Court in determining the question:

1. Plaintiff bank calculated interest for a period of time using a 360 day factor applied to 365 days while the Defendants were charged the maximum rate of 10 per cent per annum.

2. Plaintiff had knowledge that the above factor was being used and that the factor would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days.

3. That other banks in the State of Florida have customarily and routinely used the 360 day factor applied to 365 days. That this factor is developed by the use of the "Rowletts Tables" which were customarily used by said banks and that such factor and tables were used when the maximum 10 per cent interest rate was being charged to borrowers from said banks.

DATED this 8th day of February, 1977."

The Court having considered said stipulation and argument of counsel,

It is hereby ordered and adjudged as follows:

1. That Plaintiff take nothing against the Defendants.

2. That Plaintiff charged and collected a usurious rate of interest on the promissory note from September 28, 1973 through June 25, 1974 in violation of Chapter 687.03, Florida Statutes.

3. Defendants shall pay the principal balance of $52,000.00 only at $7,500.00 per year in equal annual installments as provided in said note.

4. That Defendants be and they hereby are awarded judgment against Plaintiff in the sum of $815.72, the difference between the amount of interest charged and collected by Plaintiff and the statutory rate of 6% for the period from April 12, 1973 through September 27, 1973, and in the further sum of $11,158.32, the penalty prescribed by Title 12, Section 86 U.S.C.A. for interest paid by Defendants from September 28, 1973 through June 25, 1974, and in the further sum of $15,160.28, the amount of interest paid by Defendants from June 26, 1974 through date of trial.

All for which let execution issue.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 11th day of July, A.D. 1977.

/s/ James E. Joanos
Circuit Judge

EXHIBIT "B"

ELLIS NATIONAL BANK OF TALLAHASSEE, a National Banking Corporation, Appellant,

v.

Perry L. DAVIS and Burma L. Davis, his wife, Appellee.

No. GG-397.

District Court of Appeal of Florida, First District.

April 28, 1978.

Rehearing Denied June 23, 1978.

Appeal was taken from an order of the Circuit Court, Leon County, James E. Joanos, J., entering judgment in favor of a borrower in a suit brought by a national bank on a promissory note. The District Court of Appeal, Boyer, J., held that: (1) because it was clear that the parties did not contract for a lesser or greater rate, state law fixed the interest rate on the subject note at six percent per annum; (2) the bank exacted usurious interest by charging the borrower the maximum rate of ten percent interest and calculating the interest on a 360-day year; (3) the National Bank Act furnished the exclusive remedy against the bank; (4) the borrower was entitled to recover back from the bank twice the amount of interest paid or $47,277.86, and (5) the two-year federal statute of limitations was waived because it was not raised at trial.

Affirmed in part and reversed in part.

1. Interest (Key) 31

Where it was clear that parties did not contract for lesser or greater rate of interest to be charged on promissory note, interest rate on note was fixed by statute at six percent per annum. West's F.S.A. § 687.01 et seq.

2. Usury (Key) 50

Lender violated usury laws by charging borrower maximum rate of ten percent interest and calculating interest on 360-day year. West's F.S.A. § 687.01 et seq.

3. Banks and Banking (Key) 270(1)

Where bank which was found to have charged usurious interest was national bank, statute providing that lender should forfeit double amount of interest usuriously exacted was inapplicable since bank was subject to National Bank Act which furnished exclusive remedy. West's F.S.A. § 687.04; National Bank Act, 12 U.S.C.A. § 86.

4. Banks and Banking (Key) 270(6)

Section of National Bank Act providing in first sentence that bank which has knowingly charged usurious rate of interest shall forfeit entire interest on loan transaction, and in second sentence that where usurious interest has been paid, borrower may recover back from lender twice amount of interest thus paid, must be read as furnishing separate and distinct remedies in first and second sentences thereof. National Bank Act, 12 U.S.C.A. § 86.

5. Banks and Banking (Key) 270(6)

In section of National Bank Act providing that bank's knowing exaction of usurious interest in loan transaction

"* * * shall be deemed a forfeiture of the entire interest * * *," word "forfeiture" is prospective in tense and meaning and has no application to interest already paid. National Bank Act, 12 U.S.C.A. § 86.

6. Banks and Banking (Key) 270(6)

Where parties stipulated that borrower paid interest, which was found to be usurious, in sum of $23,638.93, in connection with loan from national bank, borrower was entitled to recover back from bank twice that amount or $47,277.86. National Bank Act, 12 U.S.C.A. § 86.

7. Limitation of Actions (Key) 182(5)

Two-year statute of limitations contained in section of National Bank Act providing for borrower to recover back from national bank which has exacted usurious interest twice amount of interest so paid was inapplicable where not raised at trial in state court since statute of limitations is affirmative defense which is waived if not pleaded. National Bank Act, 12 U.S.C.A. § 86.

James C. Truett of Madigan, Parker, Gatlin, Truett, Swedmark & Skelding, Tallahassee, for appellant.

Charles J. Franson of Bryant, Franson, Miller, Olive, Brant & Ryan, Jacksonville, for appellee.

BOYER, Judge.

Ellis National Bank of Tallahassee (Bank) who was plaintiff in the trial court, appeals a final judgment in favor of appellee Davis and his wife (Davis) which has its genesis in a suit commenced by the Bank on a promissory note from Davis to the Bank.

The note was prepared by Mr. Davis, the Vice-President of a bank located in Jacksonville, executed by him and Mrs. Davis, and forwarded to the Bank in Tallahassee in March of 1973. The note secured a loan in the sum of $75,000 and was to be paid in annual installments of $7,500 each, interest to be paid quarterly. The space provided in the note for insertion of the rate of interest was left blank and the evidence from all witnesses who testified on the point was to the effect that there was no agreement between Davis and the Bank as to the rate of interest to be charged. Interest was billed quarterly by the Bank and paid by Davis. The rate charged was initially 7½ per cent per annum, then 9¾ per cent per annum and then finally 10%. In late 1975 the Bank decided that the stock which it held as security for the note had so decreased in value that a demand for additional security was made. Davis refused and the Bank accelerated payment on the note. The Bank sued seeking to have a sale of the security whereupon Davis answered alleging usury as an affirmative defense and counterclaiming against the Bank for damages in an amount equal to twice the amount of interest paid in accordance with Title XII, Section 86 U.S.C.A. In due course the trial court entered a pre-trial order setting forth the following issues to be determined: (1) When the plaintiff Bank made its demand for additional collateral on September 25, 1975, did it, in good faith, believe that prospective payment of the note or performance of defendant's obligations were impaired? (2) Was there an agreement between the plaintiff and the defendants as to the interest rate which would be charged upon the note which was given by the defendants to the plaintiff, and if so what was the interest rate? (3) Did the fact that the Bank calculated the interest for a period of time using a 360 day factor applied to 365 days constitute usury when the

interest rate during those periods of time was 10%? (4) Do the provisions of F.S. 687.01— "In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 6% per annum, but parties may contract for a lesser or greater rate by contract in writing" preclude submission to the jury of issue number two or was this provision waived by the conduct of the parties? The jury found for Davis as to the first issue viz.: That the Bank's demand for additional collateral was not in good faith and the trial judge directed a verdict in favor of Davis as to the second and fourth issues thereby determining that there was no agreement between Davis and the Bank as to the interest rate to be charged and that F.S. 687.01 required as a matter of law that the interest accrue at the rate of 6 per cent per annum. As to the third issue relating to usury the parties stipulated that the Bank calculated the interest using a 360 day factor in accordance with Rowlett's Tables while charging Davis the maximum interest rate of 10 per cent; that the Bank knew that the factor was being used and that it would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days; and that other banks in Florida customarily used the 360 day factor developed by use of Rowlett's Tables when the maximum 10 per cent interest rate was being charged to borrowers. After considering the stipulation and arguments the court found for Davis as to the third issue and that the Bank had c 'lected a usurious interest rate from September 28, 1973 through June 25, 1974. The court thereupon ordered that Davis pay the principal balance on the note without paying any interest, that Davis be awarded $815.72, the difference between the amount of interest charged and collected by the Bank over and above the statutory rate of 6 per cent; that Davis be paid the sum of $11,158.32, the penalty prescribed

by Title XII, Section 86, U.S.C.A. for interest paid by Davis from September 28, 1973 through June 25, 1974; and that Davis be paid the sum of $15,160.28, the penalty for the amount of interest paid by Davis from June 25, 1974 through the date of trial.

[1] Although, because of our treatment of appellant's second point which will be hereafter discussed, it is not necessary that we address its first point, we nevertheless note that we agree with the learned trial judge that F.S. 687.01 fixes the interest rate on the subject note at 6 per cent per annum since the evidence is clear that the parties did not contract for a lesser or greater rate.

As to appellant's second point, viz.: That the trial court erred in finding that the interest rate charged Davis by the Bank from September 28, 1973 to June 25, 1974 was usurious by virtue of computation at the maximum legal rate of 10 per cent on the basis of a 360 day year rather than the actual calendar year of 365 days, there appears to be a division of authority in other jurisdictions and no reported Florida case has apparently addressed the issue.

The parties agreed during oral argument before this court and stipulated before the trial court that we are not here concerned with "spreading": That the issue is whether the interest during the period that interest was being charged by the Bank at the rate of 10 per cent exceeded the maximum legal rate allowed by F.S. 687.03. As above stated the parties also stipulated that the Bank knowingly charged, during the subject period, interest at the rate of 10 per cent based upon a 360 day year and knew that such computation would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days. We are not, therefore, here involved with a case of inadvertence, oversight

or mistake and the simplest of mathematics reveals that 10 per cent of a given sum results in a greater per diem rate if computed on a basis of a 360 day year than if computed on the basis of a 365 day year. Appellant urges that the difference is "de minimis" or not material. However, we note that F.S. 687.03 affords no leeway. It provides, in material part: "It shall be usury and unlawful * * * to reserve, charge or take for any loan * * * except upon an obligation of a corporation, a rate of interest greater than 10 per cent per annum, either directly or indirectly, * * *".

In *American Timber and Trading Company* v. *The First National Bank of Oregon,* 511 F.2d 980 (1975) the United States Court of Appeals of the Ninth Circuit had occasion to consider a factually similar case involving Oregon law. Although that court carefully and specifically limited its construction to Oregon law we are of the view that its rationale is applicable in Florida. We are particularly impressed with the following statements contained in that opinion:

> "* * * The bank contends that the use of a 365/365 method creates difficult computations and, therefore, for reasons of convenience the banking community considers it proper to use the simpler 365/360 method. The district court noted that the legislative intent in enacting usury laws is to protect borrowers from paying excessive interest. The court felt the act should be construed with regard to its net effect upon the borrower rather than upon the bookkeeping burden, custom, or convenience of the lender. The court noted that the bank used the 365/365 method to compute interest it paid to its depositors. Moreover, the court doubted whether the practice could obtain legitimacy by long and heavy borrowing would the question ever

> arise. Therefore, it concluded that it could not be said that the Legislative Assembly has acquiecsed in a practical construction of the law at odds with the plain meaning of its words. Again, we agree with the district court's ruling.
>
> * * *
>
> "* * * Any claim by the banking industry that ease of calculation is justification for exacting higher interest is of dubious validity in this age of computer technology." (511 F.2d at pages 983 and 984)

[2] Although factually dissimilar, and involving a different specific issue, our holding sub judice is, we believe, supported by the philosophy of *Dixon* v. *Sharp,* 276 So.2d 817 (Fla.1973). We are here also in line with Attorney General Opinion 075-269 wherein the Attorney General of the State of Florida opined affirmatively to the query "Is it a violation of Chapter 687, F.S. (Interest and Usury), for a lender to calculate interest on a 360-day year, where an individual is charged the maximum rate of 10% interest?"

We accordingly affirm the trial court as to the points raised by appellant.

[3] Davis cross assigned as error the amount of the money judgment as fixed by the trial court. We find that point to merit our attention.

F.S. 687.04 provides:

> "Any person, or any agent, officer or other representative of any person, willfully violating the provisions of § 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at

> law or in equity; and when, said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; * * *"

That statute, however, is here inapplicable because appellant is a national bank and is subject to Title XII, Section 86, U.S.C.A., which furnishes the exclusive remedy when a national bank is found guilty of exacting usurious interest. (See *Coral Gables First National Bank* v. *Constructors of Florida*, 119 So.2d 741 (Fla. 3d DCA 1960) and cases therein cited) That statute provides:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same:"

[4] Although appearing at first blush to be clear and unambiguous, there is great confusion among the courts which have had occasion to consider its application to a specific factual situation. There is, though, one area of its construction upon which all agree, viz.: The first sentence of the statute and the second sentence thereof must be read separately as furnishing separate and distinct remedies. (See *Coral Gables First National Bank* v. *Constructors of Florida, supra; Western Union Telegraph Co.* v. *Mahone*, 120 Va. 422, 91 S.E. 157 (1917); *First National Bank of Lake Benton* v. *Watt*, 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed.2d 475 (1902), and *Cronkleton* v. *Hall*, 66 F.2d 384 (8th Cir. 1933).) In considering the question of the imposition of penalties provided by the subject statute, it was stated in *Mitchell* v. *Joplin National Bank*, (1918) 204 S.W. 1125, 200 Mo.App. 243 that:

> "There are two entirely different divisions of the section. The first provides for a forfeiture when usury has been knowingly contracted for and such usury entered into the note; the second provides for the recovery back of all interest paid when said interest is in part usurious."

Our own F.S. 687.04, though not applicable to a national bank, has similar wording and has been construed similarly. (See *Purvis* v. *Frink*, 61 Fla. 712, 54 So. 862 (1911); *Lyle* v. *Winn*, 45 Fla. 419, 34 So. 158 (1903) and *Levin* v. *Fisher* (Fla. 3rd DCA 1963) 150 So.2d 730)

[5] As noted, the first sentence of the subject federal statute provides that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by [the applicable law], * * * shall be deemed a forfeiture of the entire interest which the note * * * carries with it, or which has been agreed to be paid thereon." The word "forfeiture" is prospective in tense and meaning. It has no application to that which has already been accomplished, viz.: To interest already paid. The learned trial judge was therefore correct in holding that by virtue of that provision of the statute no further interest would be required to be paid on the note because, pursuant to the wording of the statute, such interest was "forfeited" because of the usurious nature of the transaction.

We turn now to a consideration of the second sentence of the statute which, as above recited, encompasses a completely separate and distinct penalty. That provision provides that in case a usurious rate of interest has actually been *paid* the debtor may recover back from the creditor bank "twice the amount of interest thus paid". The Supreme Court of the United States in *First National Bank of Lake Benton* v. *Watt, supra,* held that although the statute is penal in character and must be strictly construed, it must nevertheless be given a construction in keeping with its "obvious intent" and that the second sentence "subjects the creditor to pay twice the amount of the entire interest illegally exacted". Our sister court of the Third District, in *Coral Gables First National Bank* v. *Constructors of Florida, supra,* considering application of the same statute, said:

> "* * * Where the interest has been *paid,* the person so paying it may *recover back twice the amount paid.* * * *" (Emphasis the Court's: 119 So.2d at page 747)

[6] Sub judice the parties have stipulated that Davis paid interest in the sum of $23,638.93. Twice that amount is $47,277.86. It is that amount, and only that amount, that Davis is entitled to recover back from the bank. That portion of the final judgment awarding money damages is therefore hereby amended accordingly.

[7] Lest it appear that we have overlooked the concluding sentence of the subject Federal Statute which contains a two year statute of limitations "from the time the usurious transaction occurred", we acknowledge that provision, but observe that its construction has no application sub judice for the reason that all authorities agree that such provision constitutes a statute of limitations which is, in Florida, an affirmative defense which is waived if not pleaded. It has not been raised sub judice.

Further, we are aware that *Cronkleton* v. *Hall, supra,* which was not cited by either party but was discovered by our own research, lends a construction to the subject Federal Statute different from that which we have applied sub judice. However, we have found no other case construing the statute in the manner as did the *Cronkleton* court and that court's construction does not appear to us to be in keeping with the plain meaning of the words of the statute itself; nor does its reasoning comport with the interpretation given by our own courts to our own statute which contains a similar provision.

AFFIRMED IN PART and REVERSED IN PART.

McCORD, C. J. and MASON, ERNEST E., Associate Judge, concur.

ON PETITION FOR REHEARING

DENIED

BOYER, Judge.

By petition for rehearing appellant urges that by our holding that its charge of an interest rate in excess of the maximum allowed by law constituted usury is in conflict with our own opinion in *North American Mortgage Investors* v. *Cape San Blas Joint Venture,* 357 So.2d 416 (Fla. 1st DCA 1978), which opinion was entered on June 17, 1977. Although that opinion was a one sentence per curiam affirmance, appellant cites us to the record in an attempt to establish conflict. Without here addressing the propriety of citing a "PCA" (see *Department of Revenue* v. *Young American Builders,* 358 So.2d 1096 (Fla. 1st DCA 1978)) we note that even the allegations of appellant's petition for rehearing does not demonstrate any conflict. *North American Mortgage Investors* v. *Cape San Blas Joint Venture, supra,* according to appellant's own

petition for rehearing, involved an unintentional overcharge. Sub judice, on the other hand, the bank *stipulated* that it knowingly employed a manner of computation which it *knew* would produce more interest than the maximum legal rate.

Appellant also urges that we overlooked the holding in *Dixon* v. *Sharp*, 276 So.2d 817 (Fla. 1973). A reading of our opinion, however, reveals that we expressly recognized, indeed relied upon, that opinion, saying:

> "Although factually dissimilar, and involving a different specific issue, our holding sub judice is, we believe, supported by the philosophy of *Dixon* v. *Sharp*, 276 So.2d 817 (Fla. 1973). * * *"

Finally, appellant contends that we have "overlooked and misconstrued the plain language of the second sentence of Title 12, United States Code Annotated, Section 86." In so urging appellant takes a position for the first time in its petition for rehearing which was never urged in its original brief at oral argument, nor in the supplemental brief which this court ordered for the specific purpose of seeking counsel's aid in the construction of that statute. We have nevertheless considered appellant's contentions and find them not to merit a revisiting of our original opinion.

The petition for rehearing is, therefore, denied.

McCORD, C. J., and MASON, ERNEST E., Associate Judge, concur.

EXHIBIT "C"

SUPREME COURT OF FLORIDA

THURSDAY, NOVEMBER 9, 1978

CASE NO. 54,698

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

v.

PERRY L. DAVIS, et ux.,
Respondents.

District Court of Appeal,
First District

GG-397

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ENGLAND, C.J., BOYD, OVERTON and ALDERMAN, JJ., concur

ADKINS, J., dissents

TC

cc: Hon. Raymond E. Rhodes, Clerk
Hon. James E. Joanos, Judge
Hon. Paul F. Hartsfield, Clerk
Julius F. Parker, Jr., Esquire
Charles J. Franson, Esquire
James C. Truett, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ (Illegible)
Deputy Clerk

In the Supreme Court of the United States

No. 78-.....78-1227

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

vs.

PERRY L. DAVIS and BURMA L. DAVIS, his wife,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

SUPPLEMENT TO PETITION FOR CERTIORARI

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In the Supreme Court of the United States

No. 78-.....

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Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

SUPPLEMENT TO PETITION FOR CERTIORARI

ARGUMENT

This Supplement to Petition for Certiorari is filed by the Petitioner, Ellis National Bank of Tallahassee, pursuant to Rule 24(5) of the Supreme Court Rules to bring to the Court's attention a decision of the Supreme Court of Florida rendered on February 1, 1979, while the original Petition for Certiorari herein was being printed, and which

Petitioner feels bears directly on the questions to be decided by the Court. The case is *Cesary* v. *The Second National Bank of North Miami,* Case No. 53,497, decided February 1, 1979.

The facts of the case basically are as follows:

Ann Cesary borrowed $8,800.44 from The Second National Bank of North Miami evidenced by a promissory note dated March 29, 1972, which on its face provided for an interest rate of eleven percent (11%) per annum. Subsequently she brought an action against the Bank on behalf of herself and all other borrowers who had borrowed from the bank sums less than $500,000.00 at an interest rate in excess of ten percent (10%) per annum. A copy of her complaint is attached hereto as Exhibit "A". A copy of the promissory Note executed by her and dated March 29, 1972, is attached hereto as Exhibit "B". An Amendment to the Complaint dated May 14, 1975, is attached hereto as Exhibit "C". The Bank filed its Answer and Affirmative Defenses, a copy of which is attached as Exhibit "D" and the Plaintiff then filed Avoidance of Affirmative Defense, a copy of which is attached as Exhibit "E".

The United States District Court for the Southern District of Florida, on October 22, 1975, entered its Order Determining Constitutionality of Statute and Denying Maintenance of Class Action, a copy of which is attached hereto as Exhibit "F".

After several proceedings in the Court, the District Court for the Southern District of Florida, on December 22, 1975, entered its Order of Summary Judgment, a copy of which is attached as Exhibit "G". The Court's holding in granting Summary Judgment in favor of the Bank was as follows:

"Under Florida Statute §656.16(1), Morris Plan Banks and Industrial Savings Banks have the right to lend money upon the security of co-makers, personal chattels or other property and '. . . to take, receive, reserve and charge for such loans or discounts made or upon any notes, bills of exchange or other evidences of indebtedness, a discount not to exceed eight percent per annum upon the total amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments, plus an additional charge not to exceed two percent of the principal amount of any loan, which additional charge shall be for investigating the character of the individual applying for the loan, the securities submitted and all the costs in connection with the making of such loans, all of which charges and discounts may be collected at the time the loan is made.'

It should be noted that the discount method of computing interest rates as provided under Chapter 656 of the Florida Statutes for Industrial Savings Banks will allow for a slightly higher annual percentage rate for a given simple interest rate than will the add-on interest method of computation. However, even if we take eight percent add-on interest as being the maximum allowable under the Industrial Savings Bank Act, given the five-year term of the Cesary loan, this yields a corresponding annual percentage rate of 14.13 percent even without reference to the additional charge not to exceed two percent of the principal amount of the loan for credit investigation as permitted under Florida Statute §656.17(1).

Since the annual percentage rate of the Cesary loan, as reflected on the face of plaintiff's Exhibit 'A', is only 11.00 percent, it is evident that the interest rate charged to Cesary was well within the allowable eight percent discount rate provided for under the Industrial Savings Bank Act. Indeed, the simple interest rate for a five-year period corresponding to the 11.00 percent annual percentage rate charged to Cesary would be 6.09 percent. That is, to arrive at the 11.00 percent annual percentage rate, Cesary was charged only 6.09 percent add-on interest. This is obviously below the allowable eight percent discount rate.

Accordingly, the interest rate charged to Cesary by the defendant was not usurious under the laws of the State of Florida, which laws are made applicable to national banks under 12 U.S.C. §85, supplemented by Ruling 7.7310 of the United States Comptroller of the Currency. In accordance with such ruling are the cases of Northway Lanes v. Hackley Union National Bank and Trust Company, 334 F. Supp. 723 (W.D. Mich. 1971), aff'd 464 F. 2d 855 (6th Cir. 1972) and Commissioner of Small Loans v. First National Bank, 300 A. 2d 685 (Court of Appeals, Maryland, 1973).

For these reasons, the Court finds that the loan to plaintiff by the Second National Bank of North Miami is not usurious, and further finds that judgment should be entered in favor of defendant as a matter of law. It is, then,

ORDERED and ADJUDGED that summary judgment be and the same hereby is entered in favor of defendant and against plaintiff, who takes nothing, and this cause is hereby DISMISSED.

DONE and ORDERED at Miami, Florida, this 22nd day of December, 1975."

On December 31, 1975, the District Court for the Southern District entered its Order denying cross-motion for Summary Judgment or alternative relief, and denying Motion for New Trial or Rehearing, a copy of which is attached hereto as Exhibit "H".

The Plaintiff then took an appeal to the United States Court of Appeals for the Fifth Circuit and the Fifth Circuit certified two questions to the Supreme Court of Florida. The Supreme Court of Florida rendered its decision on the certified questions by Opinion dated February 1, 1979, a copy of which is attached as Exhibit "I".

Petitioner submits that under the decision of the Supreme Court of Florida, as applied to the decision of the United States District Court for the Southern District of Florida, the Bank in the case at bar could have charged an interest rate as high as 14.13 percent without committing the offense of usury and that, therefore, there was no usury in the case at bar, since it is uncontroverted that only three payments on the loan in question to Mr. Davis carried interest at a rate in excess of ten percent, and those payments carried interest at the rate of ten percent times 365 over 360, as the result of the use of the Rowlett's Tables, or a simple interest rate of 10.139 percent. In the *Cesary* case, the stated interest rate on the face of the note, attached hereto as Exhibit "B", was 11 percent and the United States District Court for the Southern District of Florida held that that rate was not usurious as a matter of law and entered Summary Judgment for the Bank.

CONCLUSION

Throughout the proceedings in the Courts below, the Petitioner operated on the assumption that it was limited to a rate of ten percent (10%). The decision of the Southern District of Florida (Exhibit "G"), coupled with the decision of the Supreme Court of Florida of February 1, 1979 (Exhibit "I"), drastically change the underlying substantive law of the State of Florida, under which the loan in the case at bar *was not usurious,* regardless of the use of the 360-day year.

Based on the original Petition and this Supplement, Petitioner respectfully urges the Court to grant Petition for Certiorari and to order briefs and oral arguments on the merits herein.

Respectfully submitted,

/s/ JULIUS F. PARKER, JR.
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Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Petitioner, Ellis National Bank of Tallahassee

CERTIFICATE OF SERVICE

I, JULIUS F. PARKER, JR., attorney for Ellis National Bank of Tallahassee, a National Banking corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1979, I served copies of the foregoing Supplement to Petition for Certiorari on the several parties thereto as follows:

On Perry L. Davis and Burma L. Davis, his wife, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

Charles L. Franson, Esquire
Bryant, Dickens, Franson and Miller
P. O. Box 5774
Jacksonville, Florida 32207

/s/ JULIUS F. PARKER, JR.
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
P. O. Box 669—318 North Monroe Street
Tallahassee, Florida 32302
(904) 222-3730

APPENDIX

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 75-654-CIV-WM

ANN M. CESARY, a/k/a ANN M. JOHNSON, individually and for all others similarly situated,
Plaintiff,

vs.

THE SECOND NATIONAL BANK OF NORTH MIAMI, a United States banking corporation,
Defendant.

INDIVIDUAL AND CLASS ACTION COMPLAINT FOR DEBT AND RECOVERY OF USURIOUS INTEREST AGAINST A NATIONAL BANK

COMES NOW ANN M. CESARY, a/k/a ANN M. JOHNSON, Plaintiff in this cause, by and through her counsel undersigned, and sues THE SECOND NATIONAL BANK OF NORTH MIAMI, a United States Banking corporation, Defendant, and as and for her Complaint alleges the matters and things set forth in each of the following numbered paragraphs:

1) Plaintiff is a resident of Dade County Florida and is sui juris. The Defendant, SECOND NATIONAL BANK

OF NORTH MIAMI, is a banking corporation organized under the laws of the United States whose banking house and place of business is in Dade County, Florida.

2) Jurisdiction in this Court arises, as will appear below, under the provisions of Title 28, United States Code, §1355 and also under the provisions of Title 28, United States Code, §1337. This action arises under the provisions of Title 12, United States Code, §85 and §86.

3) On March 29, 1972, your Plaintiff borrowed from the Defendant Bank the sum of $8,800.44 which was evidenced by the installment promissory note, a copy of which is attached hereto as Plaintiff's Exhibit A and which was secured by a mortgage deed recorded in the Public Records of Dade County, Florida, in OR 7692, at Page 295, Public Records of Dade County, copy attached hereto as Plaintiff's Exhibit B, both of which Exhibits are incorporated herein by reference as if fully set out and made a part hereof.

4) Plaintiff, from time to time, made payments on the promissory note as required by the terms thereof and has made interest payments on the said note within the two year period last past the date of filing of this action.

5) The aforesaid note on its face provides for an annual rate of interest of 11% per annum. Under the provisions of Title 12, United States Code, §86, the Bank is entitled to receive interest at a maximum rate allowed by the laws of the State of Florida, which is the state where the Bank is located, or, at a rate of 1% in excess of the discount rate on ninety (90) day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, whichever may be the greater and no more.

6) Under the laws of the State of Florida, the maximum interest which was allowable and is allowable for

a loan made to an individual is 10% per annum as provided by Florida Statute 687.02 and 687.03. The discount rate of the Federal Reserve Bank of Atlanta in March, 1972, was 4.1% per annum.

7) The loan made to your Plaintiff being in excess of $5,000 does not come within the interest rate exception permitted to state banks by Florida Statute 659.18 and assimilated to national banks by Title 12, United States Code, §85. In like manner, since the loan does not exceed $500,000, it does not come within the exception as to interest provided by Chapter 74-232, Laws of Florida 1974.

8) The loan contemplated by the Exhibits to this Complaint is patently usurious and under the provisions of Title 12, United States Code, §86, your Plaintiff is entitled to a declaration that the entire interest which the note carries with it is forfeit and, in addition, is entitled to Judgment in an action of debt in the amount of twice the amount of interest actually paid to the Defendant Bank and is further entitled to have an accounting taken as to the amounts paid on interest and principal under the loan and to have the amount of her penalty fixed and determined by this Court.

9) Plaintiff believes, that upon the taking of such accounting, it will be determined that the entire principal amount due to the Bank has been repaid and that she is entitled to a Judgment for double the amount of interest paid, together with such interest, costs and attorney's fees as may be allowable or provided by law, and further to a Judgment declaring the said mortgage, Exhibit B hereto, to be satisfied and to a Judgment requiring the satisfaction of the said mortgage of record by the Defendant and the return to the Plaintiff of all evidences of her debt.

10) In addition, to suing in her individual capacity, your Plaintiff sues as the member of a class and as a representative party on behalf of that class and alleges:

a) She is a member of a definable and delimitable class of persons, to-wit: those individuals who have borrowed more than $5,000 and less than $500,000 from the Defendant Bank and who have paid interest thereon within a period of two years last past the date of filing of this action where interest has been charged by the Bank on such loans in excess of 10% per annum.

b) The class is so numerous that joinder of all members is impracticable, your Plaintiff alleging that it appears that there may be as many as 1,000 members of the said class, the exact number of the members to be defined upon further proceedings in this cause.

c) The question of law and fact respecting the usurious nature of the transaction is common to all members of the class and the members of the class as debtors have a united and single interest as against the Bank in recovering the usurious interest extracted from them by the Bank.

d) The claims of your Plaintiff are typical of the claims of the class.

e) Your Plaintiff will fairly and adequately protect the interest of the class.

f) The Defendant Bank has refused to act on grounds generally applicable to the class by refusing to recognize the usurious character of the transaction thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

g) This Court should find that the questions of law or fact common to the members of the class predominate over any questions effecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This is particularly true in light of the fact that the Bank is continuing to collect interest on these usurious contracts and to demand that interest from their borrowers and the Statute of Limitations rolls on every day insulating the Bank from the legitimate claims of their debtors for the recovery of their unlawful and usurious interest payments.

11) Your Plaintiff has retained the services of MILTON FELLER, SHALLE STEPHEN FINE and STEVEN BROWNSTEIN to act as her attorneys in this cause, both individually and on behalf of the class which she represents and they are entitled to reasonable attorney's fees for their services to her and for their services to the class from any recovery and corpus created as a result of this lawsuit.

WHEREFORE, your Plaintiff prays that this Court will:

1) Take jurisdiction of this action and of the parties hereto; and

2) Adjudicate this action as a class action; and

3) After notice and hearing, take an accounting of the payments and interest paid by your Plaintiff and by all other members of the class she represents; and

4) Adjudicate the amount of interest penalty to be recovered by your Plaintiff under the provisions of Title 12, United States Code, §85 and 86 and like manner adjudicate the amount to be recovered by the other members of the class which she represents; and

5) Enter its Final Judgment awarding to your Plaintiff and to the members of the class which she represents their due with respect to the interest and penalty which they are entitled to recover and also adjudicate and award to the Plaintiff for herself and on behalf of the class such reasonable attorney's fees, costs and interest as may be provided by law; and

6) Declare Plaintiff's rights with respect to the collateral security furnished to the Defendant Bank and in like manner declare the rights of the other members of the class with respect to collateral securities furnished by them and require the disposition of those securities in accordance with right and justice; and

7) Grant such other further and general relief as may be meet and proper in the circumstances.

* * *

EXHIBIT "B"

PROMISSORY NOTE – INSTALLMENT

North Miami, Florida March 29, 19 72

$1,832.00

For value received the undersigned (and if more than one, each of them jointly and severally), hereinafter called "Maker," promises to pay to the order of

The Second National Bank of North Miami

hereinafter called "Bank" at its banking house in North Miami, Florida, the sum of Eleven Thousand Eight Hundred Thirty-Two and no/100 DOLLARS (TOTAL OF PAYMENTS) in 60 monthly installments of $197.20 each, on the 25th day of each successive month commencing on April 25, 19 72, and will pay late charges not to exceed 5¢ of the amount of any principal payment or payments in default. All payments made hereunder shall be credited first to interest and lawful charges then accrued and the remainder to principal. The amount of this note includes $ proceeds of $ 8,800.44 plus other charges (Describe) Ea Ins. $250.00- D.S. $17.65/- $25.00 $14.00 resulting in an AMOUNT FINANCED of $ 9,082.29) plus a FINANCE CHARGE of $ 2,749.71 (which amount includes interest of $ 2,724.69 credit life insurance premium of $ see above and loan fee cost of $ 25.02 and credit investigation cost of $) resulting in an ANNUAL PERCENTAGE RATE of 11.00.

In the event the Maker shall prepay this loan, which right is hereby granted, or in the event the payment of this loan shall be accelerated by the Bank for default by the Maker, or for any other reason, the Maker shall obtain a refund of the unearned portion of the finance charge computed under the "Rule of 78's" method.

PHYSICAL DAMAGE INSURANCE. If written in connection with this transaction, may be obtained by Customers through any duly licensed Insurance Agent or Broker of his choice, subject only to Creditor's right to refuse to accept any insurer offered by Customers, for reasonable cause. If such insurance is procured by Creditor(s), with insurance premiums therefore financed as part of Credit Sale, the cost will be $ for the term of the Credit Sale obligation, based upon current rates and representations of Customers as to use of Collateral, their Record and Classification.

CREDIT LIFE AND/OR DISABILITY INSURANCE are not required for credit purchase of said through Creditor (s) being voluntary on Customers' part. No such Credit Insurance is provided unless the Customer to be insured under such Credit Insurance Policies signs the appropriate Statement below.

(a.) The Premium (Cost) for Credit Life Insurance will be $ 250.00 for the term of the credit. -$5,000.00 - 5 yrs.

(b.) The Premium (Cost) for Credit Life & Disability Insurance will be $, for the term of the credit.

I DESIRE CREDIT LIFE AND DISABILITY INSURANCE:

(SEAL)

(Date) (Signature of Customer)

I DESIRE CREDIT LIFE INSURANCE ONLY:

3/29/72

(Date)

(SEAL)

(Signature of Customer)

EXHIBIT "C"

[Title Omitted]

AMENDMENT TO COMPLAINT

COMES NOW ANN M. CESARY, a/k/a ANN M. JOHNSON, by and through her counsel undersigned and amends her Complaint previously filed in this cause in the following respects:

1. She amends Paragraph 10(a) by striking the said paragraph and substituting therefore the following paragraph:

(a) She is a member of a definable and delimitable class of persons, to-wit: "Those individuals who have borrowed less than $500,000.00 from the Defendant Bank and who have paid interest thereon within a period of two (2) years last past the date of filing of this action where interest has been charged by the Bank on such loans in excess of 10 per cent per annum".

DATED this 14th day of May, 1975.

* * *

EXHIBIT "D"

[Title Omitted]

ANSWER AND AFFIRMATIVE DEFENSES

THE SECOND NATIONAL BANK OF NORTH MIAMI, defendant in this cause, for Answer to the plaintiff's Complaint and by way of Affirmative Defenses thereto, says:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

(A) Defendant admits the allegations of paragraphs 1, 2 and 4 of the plaintiff's Complaint.

(B) Defendant admits so much of paragraph 3 of the plaintiff's Complaint as states that the plaintiff borrowed a sum of money from the defendant Bank, and denies the remaining allegations of paragraph 3, except to state that as "additional collateral," the indebtedness was secured by a mortgage deed, but that the primary collateral is reflected on the face of Exhibit A being a security agreement on a 1965 Vagabond mobile home to include all furniture and appliances, as well as a 1968 Thunderbird automobile.

(C) Defendant admits so much of the allegations of paragraph 7 of the plaintiff's Complaint as states that the loan is in excess of $5000.00 and does not exceed $500,000.00, but denies the remaining allegations of paragraph 7.

(D) Defendant denies the allegations of paragraphs 5, 6, 8, 9, and all of the allegations contained in paragraph 10 as amended, and all sub-parts thereof.

(E) Defendant is without knowledge as to the allegations of plaintiff's Complaint regarding retention of legal services, but denies that plaintiff's counsel is entitled to the attorneys' fees claimed.

(F) Defendant denies each and every allegation of the plaintiff's Complaint not hereinabove specifically admitted.

AFFIRMATIVE DEFENSES

The loan made by the defendant Bank to plaintiff was made under terms and at an interest rate which falls within that exception to the Florida Interest and Usury Law provided for Industrial Savings Banks and Morris Plan Banks, F.S. 656.011 et seq, in that (a) the loan covers personal chattels and a real estate mortgage as provided in F.S. 656.17(1) and (5), respectively, and (b) the interest rate does not exceed a discount of eight (8%) percent per annum on the amount of the loan from its inception to date of maturity of the final installment. Such discount of eight (8%) percent would yield an annual percentage rate in excess of 14.13%, while the plaintiff's annual percentage rate is 11% as reflected on the face of the promissory note. In the same manner, all loans made by THE SECOND NATIONAL BANK OF NORTH MIAMI to the members of the purported class, fall within one or another of such exceptions recognized under F.S. 687.031 and which exceptions are detailed in the defendant's "Memorandum on Statutory Exceptions to the Florida Interest and Usury Law", the contents of which Memorandum are incorporated into these Affirmative Defenses by reference.

WHEREFORE, defendant prays that the plaintiff's Complaint be dismissed at the cost of the plaintiff both as to the individual and class aspect claims of such Complaint.

* * *

EXHIBIT "E"

[Title Omitted]

AVOIDANCE OF AFFIRMATIVE DEFENSE

COMES NOW the Plaintiff, by and through her counsel undersigned, and files this her Avoidance of the Affirmative Defenses filed by the Defendant Bank and shows this Court as follows:

1) The Defendant Bank pleads as an affirmative defense that the loan made by the Plaintiff falls within an exception to the Florida Usury Law provided by F.S. 656.011 et seq. for loans made by Industrial Savings Banks and Morris Plan Banks. The Bank further asserts that this is an exception recognized under the general Usury Statute, Florida Statutes 687.031. The Bank further asserts that as respects loans made by other members of the class in this case, they all fall within the exception cited or other similar exceptions.

2) The exception provided in Florida Statute Chapter 656 and particularly Florida Statute 656.17(1) does, in fact, constitute a special exception for Industrial Savings Banks and Morris Plan Banks as defined in that chapter and does, in fact, come within the purview of Florida Statute 687.031 which provides as follows:

> "Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury (chapter 687) and specifying the interest rates and charges which may be made pursuant to such exceptions which relate to banks, Morris Plan Banks, discount consumer financing, small loan companies and domestic building and loan associations."

The exception for Industrial Savings Banks and Morris Plan Banks above cited is a special exception and a special law. In like manner, each of the other exceptions relied upon by the Defendant Bank, as respects other members of the class, is a special exception and special law.

3) The constitution of the State of Florida, as adopted in 1968, provides in Article III, §11 as follows in pertinent part:

> "a) There shall be no special law or general law of local application pertaining to: (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts;"

4) Article XII of that constitution, §6 provides in pertinent part:

> "(a) All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed."

5) It is clear that the special laws relied upon by the Defendant Bank are unconstitutional and invalid and can afford the Bank no defense. In this connection, we adopt in full the argument made by the Plaintiff in her Memorandum in Opposition to Motion to Dismiss and in support of certification of cause as class action served May 22, 1975, and filed in this cause and particularly the argument made in subsection II thereof.

* * *

EXHIBIT "F"

[Title Omitted]

ORDER DETERMINING CONSTITUTIONALITY OF STATUTE AND DENYING MAINTENANCE OF CLASS ACTION

[Filed October 22, 1975]

This cause came on for hearing before the Court on July 10, 1975 for the purpose of determining whether this action may appropriately be maintained as a class action. At such hearing, this Court observed, inasmuch as the defensive position of THE SECOND NATIONAL BANK OF NORTH MIAMI, hereinafter referred to as the "BANK", involved the operation of Florida Statute §687.031 and the exceptions to the Florida general law governing interest and usury noted in Florida Statute §687.031, that it would be desirable to determine the constitutionality of such Florida statute and the statutory exceptions noted therein. For this purpose, the Court proposed, pursuant to Title 28 U.S. Code §2281, that the matter be heard and determined by a District Court of three judges under §2284 of Title 28 U.S. Code.

Pursuant thereto, this Court, as required by §2284 of Title 28 U.S. Code, notified the Chief Judge of the Fifth Circuit Court of Appeals requesting the composition of a three-judge District Court. Following consideration of this matter, the Fifth Circuit Court of Appeals has now notified this Court that it declines to appoint a three-judge District Court in this matter, and has returned this matter for consideration and determination by the undersigned District Judge.

This Court having considered the pleadings, affidavits, depositions, authorities and arguments made and submitted by the respective parties, enters this order.

NATURE OF ACTION

On January 23, 1975 the BANK filed a complaint in the Circuit Court of the 11th Judicial District in and for Dade County, Florida, Case No. 75-2421, seeking to foreclose upon a note and mortgage given to it by ANN M. CESARY, a/k/a ANN M. JOHNSON, hereinafter referred to "CESARY".

Thereafter this action was instituted by CESARY against the BANK in the United States District Court for the Southern District of Florida, Miami Division, Case No. 75-654-CIV-WM seeking to maintain an individual and class action complaint for debt and recovery of usurious interest allegedly charged by the BANK to CESARY and the purported class which the plaintiff sought to represent, comprising "Those individuals who have borrowed less than $500,000.00 from the Defendant Bank and who have paid interest thereon within a period of two (2) years last past the date of filing this action where interest has been charged by the Bank on such loans in excess of ten percent (10%) per annum".

To this, the BANK has responded by filing its answer and affirmative defenses denying that usurious interest was charged to the plaintiff and further asserting that all of the loans made by the BANK to members of the purported class fall within one or another of the exceptions recognized under Florida Statute §687.031 which allow for the charging of interest in excess of ten percent (10%) simple interest per annum, under the conditions set forth in such statutory exceptions. Among the statutes referred

to by Florida Statute §687.031 as exceptions to the general Florida interest and usury law are statutes providing for industrial savings banks and Morris plan banks, Florida Statute §656.011 and the BANK asserts that the loan which the BANK made to CESARY was made pursuant to such statute which allows for interest to be charged up to a rate of eight percent (8%) discount per annum which correspondends to an annual percentage rate in excess of 14.13 percent (14.13%).

The BANK further maintained that as a national bank it may charge interest at the maximum rate permitted by the state law to any competing state chartered or licensed institution, and therefore was permitted to charge interest pursuant to the exceptions to the general law governing interest and usury for the State of Florida as noted in Florida Statute §687.031.

In opposition to the maintenance of this action as a class action, the BANK submitted affidavits and the deposition of SAM HENRY, Vice-President of the BANK, to the effect that the BANK makes not one but many different kinds and categories of loans, with each kind of category of loan requiring the use of different forms or different combinations of forms, and that the interest rates, rights and obligations of the borrower and the BANK differ from one category of loan to the other.

FINDINGS

After due consideration of the pleadings, affidavits, memoranda, arguments and authorities relied upon by the parties, the Court finds that:

(a) That the State of Florida provides by statute for exceptions to the general Florida law governing interest

and usury under Chapter 687 Florida Statutes. These exceptions are noted in Florida Statute §687.031 which provides that the definition of usurious contracts and unlawful rates of interest set forth in Florida Statute §§687.02 and 687.03:

> ". . . shall not be contrued to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usuary (chapter 687) and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris plan banks, discount consumer financing, small loan companies and domestic building and loan associations."

(b) The United States Comptroller of the Currency has by Interpretive Ruling 7.7310 stated that a national bank may charge interest at the maximum rate permitted by state law to any competing state chartered or licensed lending institution. This ruling has been followed by the courts Northway Lanes vs. Hackley Union National Bank And Trust Company 334 F.Supp 723 (1971) Affirmed 464 F.2d 855 (1972) and Commissioner Of Small Loans vs. First National Bank 300 A.2d 685 (Ct of Appeals, Maryland, March 1, 1973).

(c) The statutory exceptions to the Florida interest and usury law noted in Florida Statute §687.031 are not special laws in the prohibited constitutional sense in that they have uniform operation throughout the State of Florida. A special law is one designed to operate on particular persons or things or one that operates upon classified persons or things, when classification is not permissible or the classification adopted is illegal. A general law is one relating to subjects or persons based upon proper distinctions and differences that adhere in or are peculiar or appropriate to such subject or persons. Laws based upon proper classifications may be general laws even though limited to a part of the people. Wide discretion is granted to the legislature in resorting to classification. The burden of showing that the classification provided for does not rest upon any reasonable basis, but is essentially arbitrary, is the burden of the party attacking the classification in the statute. Anderson vs. Board Of Public Instruction 136 So. 334, State Exrel. Anderson vs. Harris 163 So. 237. Uniformity of operation of a statute as required by the Florida Constitution does not require universality of operation, Lykes Bros. vs. Bigby 155 Fla. 580, but rather reasonable classification as to subject matter. Cates vs. Heffernan 18 So.2d 11.

This Court is not able on the basis of its judicial knowledge to determine that the grounds justifying the particular classifications and distinctions created by the Florida legislature for the exceptions to the general law governing interest and usury are unreasonable, and there is no substantial basis for holding Florida Statute 687.031 and the exceptions noted therein unconstitutional.

(d) In this connection, it is persuasive to note that the statutory exceptions to the Florida interest and usury law are claimed by CESARY to be unconstitutional by virtue of paragraph 9 of Article III, Section 11 of the 1968 Florida Constitution. These statutory exceptions to the Florida interest and usury law preceded paragraph 9 in time, and was it the intention of the Florida Legislature by the insertion of the new paragraph 9 into Article III, Section 11, to eliminate the already along existing statutory exceptions to the Florida interest and usury law, ample opportunity was available to the legislature for

this purpose. Instead, the Florida legislature during the years 1969 and thereafter, has on a number of occasions amended the Retail Installment Sales Act, the Industrial Savings Bank Act, The Home Improvement Sales and Finance Act and the act regulating credit unions, and by the laws of 1973 added the Florida Consumer Finance Act. These are among the exceptions contemplated by Florida Statute §687.031.

(e) Unless it can be said of the statute in question, that it positively and certainly is opposed to the Florida Constitution, this Court may not annul such statute as contrary to the Constitution. Greater Loretta Improvement Association vs. State 234 So.2d 655.

(f) With relation to the motion of CESARY to declare this action maintainable as a class action, this Court finds that the loans to the members of the purported class comprise different categories of loans, with each class or category requiring the use of different forms or different combinations of forms, and that even such forms were subject to variation based upon the requirements of the BANK and borrower in each specific transaction of loan. These different categories of loans, as well as the tailoring of each loan transaction to the needs of the particular borrower and to the BANK, result in questions of fact regarding one loan transaction not being common to the other loan transactions, so that individual questions would predominate over questions common to the proposed class. Whether the interest charge on a particular loan contract was usurious would, therefore, have to be determined borrower by borrower, contract by contract. Graybiel vs. American Savings And Loan Association 59 F.R.D. 7 (D.C.D.C. 1973). The category of loan in each transaction would likewise have to be determined, so as to ascertain

under which, if any, of the exceptions to the general law governing interest and usury the particular transaction would come. Determination of usury would then have to be made in accordance with the varying requirements of the individual statutory exceptions relative to each such loan.

CONCLUSIONS

Based upon the above findings, the Court concludes and hereby orders that:

1. Florida Statute §687.031 and the special provisions of existing statutory law creating exceptions to the general law governing interest and usury which exceptions are referred to in or within the scope of Florida Statute §687.031, are constitutional.

2. The motion of the plaintiff, CESARY, to maintain this action as a class action, is hereby denied.

Dated at Miami, Florida, this 22 day of October 1975.

W. O. Mehrtens
United States District Judge

EXHIBIT "G"

[Title Omitted]

ORDER OF SUMMARY JUDGMENT

[Filed December 22, 1975]

This cause came before the Court upon a Motion For Summary Judgment with supporting affidavits submitted by the defendant, The Second National Bank Of North Miami. Plaintiff has not filed a response to the defendant's motion.

This action commenced with the filing of plaintiff's complaint seeking to maintain an individual and class action against the defendant bank alleging that the bank had extracted a usurious rate of interest from the plaintiff and others by obtaining a rate of interest in excess of ten percent simple interest per annum.

The bank defended its position by asserting that the loans made by the defendant bank to the plaintiff and others were made under terms and at interest rates falling within the exceptions to the general law governing interest in usury in the State of Florida, which exceptions are referred to in Florida Statute §687.031. Thereafter, and while the initial pleadings of the plaintiff took no cognizance of any existing Florida Statutes creating exceptions to the general law governing interest and usury, or of the bank's right to have such law applied to it, the plaintiff, subject only to the question of constitutionality, conceded that:

1. Such laws do exist which constitute exceptions to the general law governing interest and usury in Florida, as referred to in Florida Statute §687.031, including the Retail Installment Sales Act (Florida Statute §520.30-

520.42) and the Industrial Savings Bank Act (Florida Statute §656.011-656.53); and

2. That under the provisions of the National Bank Act, the Second National Bank Of North Miami may charge interest at rates permitted by Florida law to any State chartered or licnesed lending institution, pursuant to such statutes.

However, it was the position of the plaintiff that Florida Statute §687.031 was unconstitutional in the light of Article III, §11(a)(9) of the 1968 Constitution of the State of Florida.

At the hearing held before this Court on July 10, 1975, pursuant to Local Rule 19 and Rule 23 of the Federal Rules of Civil Procedure, for the purpose of determining whether the action might appropriately be maintained as a class action, counsel for plaintiff orally acknowledged before this Court that, if Florida Statute §687.031 and the exceptions to the Florida general law governing interest and usury referred to in such statute, were determined to be constitutional, then the bank, under such exceptions, was entitled to charge interest in excess of ten percent simple interest per annum, and neither the plaintiff nor the other members of the purported class could maintain a cause of action against the bank.

Subsequently, on October 22, 1975, this Court entered its Order upholding the constitutionality of Florida Statute §687.031 and the special provisions of existing statutory law creating exceptions to the general law governing interest and usury referred to therein, and further denying the maintenance of this cause as a class action. Such order has not been the subject of a motion for rehearing or of an appeal by the plaintiff.

All relevant questions of law have been determined in favor of the defendant, and there remains only for determination by this Court the factual questions of whether the loan made by The Second National Bank of North Miami to the plaintiff, Cesary, falls within one or another of the exceptions to the Florida general law governing interest and usury.

In this respect, the plaintiff has attached Exhibit "A", a promissory note dated March 29, 1972, to the complaint. The note reflects an annual percentage rate of 11.00 percent and payments to be made over a five-year period. It also provides for securing of the loan by the granting to the bank of a security interest in a mobile home, an automobile and additional collateral in the form of a mortgage deed on real property described in the document.

Under Florida Statute §656.16(1), Morris Plan Banks and Industrial Savings Banks have the right to lend money upon the security of co-makers, personal chattels or other property and ". . . to take, receive, reserve and charge for such loans or discounts made or upon any notes, bills of exchange or other evidences of indebtedness, a discount not to exceed eight percent per annum upon the total amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments, plus an additional charge not to exceed two percent of the principal amount of any loan, which additional charge shall be for investigating the character of the individual applying for the loan, the securities submitted and all the costs in connection with the making of such loans, all of which charges and discounts may be collected at the time the loan is made."

It should be noted that the discount method of computing interest rates as provided under Chapter 656 of the Florida Statutes for Industrial Savings Banks will allow for a slightly higher annual percentage rate for a given simple interest rate than will the add-on interest method of computation. However, even if we take eight percent add-on interest as being the maximum allowable under the Industrial Savings Bank Act, given the five-year term of the Cesary loan, this yields a corresponding annual percentage rate of 14.13 percent even without reference to the additional charge not to exceed two percent of the principal amount of the loan for credit investigation as permitted under Florida Statute §656.17(1).

Since the annual percentage rate of the Cesary loan, as reflected on the face of plaintiff's Exhibit "A", is only 11.00 percent, it is evident that the interest rate charged to Cesary was well within the allowable eight percent discount rate provided for under the Industrial Savings Bank Act. Indeed, the simple interest rate for a five-year period corresponding to the 11.00 percent annual percentage rate charged to Cesary would be 6.09 percent. That is, to arrive at the 11.00 percent annual percentage rate, Cesary was charged only 6.09 percent add-on interest. This is obviously below the allowable eight percent discount rate.

Accordingly, the interest rate charged to Cesary by the defendant was not usurious under the laws of the State of Florida, which laws are made applicable to national banks under 12 U.S.C. §85, supplemented by Ruling 7.7310 of the United States Comptroller of the Currency. In accordance with such ruling are the cases of Northway Lanes v. Hackley Union National Bank And Trust Company, 334 F.Supp. 723 (W.D. Mich. 1971), aff'd 464 F.2d 855

(6th Cir. 1972) and Commissioner of Small Loans v. First National Bank, 300 A.2d 685 (Court of Appeals, Maryland, 1973).

For these reasons, the Court finds that the loan to plaintiff by the Second National Bank of North Miami is not usurious, and further finds that judgment should be entered in favor of defendant as a matter of law. It is, then,

ORDERED and ADJUDGED that summary judgment be and the same hereby is entered in favor of defendant and against plaintiff, who takes nothing, and this cause is hereby DISMISSED.

DONE and ORDERED at Miami, Florida, this 22nd day of December, 1975.

/s/ W. O. Mehrtens
Senior United States District Judge

cc: Shalle S. Fine; Sheldon Rosenberg; Michael Colodny.

EXHIBIT "H"

[Title Omitted]

ORDER DENYING CROSS MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVE RELIEF AND DENYING MOTION FOR NEW TRIAL OR REHEARING

[Filed December 31, 1975]

This cause came before the Court upon the plaintiff's Motion For Summary Judgment Or Alternative Relief. It appears to the Court that the recent Order granting summary judgment in favor of defendant disposes of several issues raised by plaintiff in her cross motion. The question of the constitutionality of Florida Statute §687.031 and the statutes creating exceptions to the state general usury statute was extensively briefed by both parties in memoranda submitted in regard to defendant's motion on this issue. This Court requested a three judge panel as a matter of course and not because the Court believed that the constitutional issue presented was substantial. The chief judge for the Fifth Circuit Court of Appeals declined the request for appointment of a three judge panel to dispose of the constitutional question. The refusal to appoint a panel indicates that he regarded the issue as lacking in sufficient substance to warrant consideration by a three judge court.

The defendant filed its motion for summary judgment on December 4, 1975. Plaintiff did not respond to the motion within the time period specified in Local Rule 10(J). This Court permitted plaintiff additional time beyond the ten-day period before entering its ruling on the motion for summary judgment on December 22, 1975. Finally, on December 29, 1975, plaintiff submitted the cross motion which is the subject of this Order. Having failed

to comply with the timeliness requirements of this Court, especially in view of the leniency exercised by the Court in this instance, plaintiff cannot now complain that she did not have an opportunity to argue the unreasonableness of the classifications set forth in those statutes which provide exceptions to the general usury law in Florida.

Nonetheless, the Court has reconsidered its ruling to the extent that it has reviewed that portion of plaintiff's memorandum in support of the cross motion which pertains to the constitutionality of Florida Statute §687.031 and the exceptions permitted thereunder. Having examined plaintiff's argument together with memoranda previously filed on this subject, the Court reaffirms its Order granting summary judgment in favor of defendant.

Plaintiff does little more than set forth the slight disparity in the various exceptions to the general usury statute. The Court has examined these exceptions and the legislative history behind them, finding that the exceptions are not special laws prohibited by paragraph 9 of Section 11, Article III, of the 1968 Florida Constitution. Indeed, since 1968 the legislature has amended and expanded these exceptions. In accordance with the foregoing, it is

ORDERED and ADJUDGED that plaintiff's motions for summary judgment and other relief and for new trial or rehearing be and the same hereby are DENIED.

DONE and ORDERED at Miami, Florida, this 31st day of December, 1975.

/s/ W. O. Mehrtens
Senior United States District Judge

cc: Shalle S. Fine; Sheldon Rosenberg; Michael Colodny.

EXHIBIT "I"

SUPREME COURT OF FLORIDA

No. 53,497

ANN M. CESARY, Appellant,

vs.

THE SECOND NATIONAL BANK OF NORTH MIAMI, Appellee.

[February 1, 1979]

ALDERMAN, J.

This cause is before us for consideration of the following questions certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to rule 4.61, Florida Appellate Rules:

1. Does Section 656.17(1), which sets the allowable interest rate for Morris Plan banks and industrial savings banks, violate Article III, Section 11(a)(9), Florida Constitution?
2. Do the special provisions of existing statutory law referred to in Section 687.031, which creates statutory exceptions to the general law of Florida governing interest and usury, violate Article III, Section 11(a)(9), as being special laws fixing interest rates on private contracts?

We answer both questions negatively and hold that neither section 656.17(1)[1] nor section 687.031,[2] Florida Statutes (1975), violates article III, section 11(a)(9), Florida Constitution.

Ann Cesary brought a suit against The Second National Bank of North Miami in her own behalf and on behalf of those individuals who have borrowed less than $500,000 from the Bank who have paid interest thereon within a period of two years last past the date of filing

---

1. Section 656.17(1) provides:

LOANS; SECURITY REQUIRED, INTEREST AND CHARGES.—The right to lend money upon the security of comakers, personal chattels, or other property and to take, receive, reserve, and charge for such loans or discounts made or upon any notes, bills of exchange, or other evidences of debt, a discount not to exceed 8 percent per annum upon the total amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments, plus an additional charge not to exceed 2 percent of the principal amount of any loan, which additional charge shall be for investigating the character of the individual applying for the loan, the security submitted and all other costs in connection with the making of such loans, all which charges and discounts may be collected at the time the loan is made. No other charge of any kind or nature whatsoever by whatsoever purpose or name designated, shall be made; provided, however, that when a loan is of such character as to necessitate the filing or recording of a legal instrument, an additional charge may be made for such filing or recording, providing such charge is actually paid to the proper public officials; also borrower may be required to pay abstract costs, reasonable attorney's fees, documentary stamp taxes, other taxes, premiums on insurance, and other similar charges, if the bank deems the same necessary for the protection and security of said loan.

2. Section 687.031 provides:

Construction, ss. 687.02 and 687.03.—Sections 687.02 and 687.03 shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury and specifying the interest rates and charges which may be made pursuant to such exceptions, including but not limited to those exceptions which relate to banks, Morris Plan banks, discount consumer financing, small loan companies and domestic building and loan associations.

this action where interest has been charged in excess of ten percent per annum. Cesary borrowed $8,800.44 from the Bank, evidenced by a promissory note dated March 29, 1972, which on its face provides for an interest rate of eleven percent per annum. Under the provisions of 12 U.S.C. § 86 (1945), the Bank was entitled to receive interest at the maximum rate allowed by Florida law. Cesary contended that under the Florida usury statute, the note was usurious on its face. The Bank defended the action on the basis of section 687.031, Florida Statutes, which allows the charging of interest in excess of ten percent for loans arising under one or more statutory exceptions outlined elsewhere in the Florida Statutes. The Bank argued that its loan fits into the exception provided in section 656.17(1) for industrial savings banks and Morris Plan banks, and that since the exception permits a 14.3 annual percentage rate, the eleven percent rate charged Cesary was not usurious. Cesary did not contest that the loans fall into the exception created by sections 656.17 (1) and 687.031. Rather, she contended that these two statutory provisions are special laws prohibited by article III, section 11(a)(9), Florida Constitution, which provides:

> (a) There shall be no special law or general law of local application pertaining to:
>
> . . .
>
> (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts . . .

Holding these two statutes constitutional, the United States District Court for the Southern District of Florida entered summary judgment for the Bank. That court said:

> The statutory exceptions to the Florida interest and usury law noted in Florida Statute §687.031 are

not special laws in the prohibited constitutional sense in that they have uniform operation throughout the State of Florida. A special law is one designed to operate on particular persons or things or one that operates upon classified persons or things, when classification is not permissible or the classification adopted is illegal. A general law is one relating to subjects or persons based upon proper distinctions and differences that adhere in or are peculiar or appropriate to such subject or persons. Laws based upon proper classifications may be general laws even though limited to a part of the people. Wide discretion is granted to the legislature in resorting to classification. The burden of showing that the classification provided for does not rest upon any reasonable basis, but is essentially arbitrary, is the burden of the party attacking the classification in the statute. Anderson vs. Board of Public Instruction, 136 So. 334, State ex rel. Anderson vs. Harris, 163 So. 237. Uniformity of operation of a statute as required by the Florida Constitution does not require universality of operation, Lykes Bros. vs. Bigby, 155 Fla. 580, but rather reasonable classification as to subject matter. Cates vs. Heffernan, 18 So.2d 11.

This Court is not able on the basis of its judicial knowledge to determine that the grounds justifying the particular classifications and distinctions created by the Florida legislature for the exceptions to the general law governing interest and usury are unreasonable, and there is no substantial basis for holding Florida Statute 687.031 and the exceptions noted therein unconstitutional.

No. 75-654 (S.D. Fla. Order Determining Constitutionality, Oct. 22, 1975).

Cesary appealed to the United States Circuit Court, Fifth Circuit, which in turn has certified to us the questions regarding the constitutionality of these statutes.

Cesary argues that the exceptions to the Florida usury statute are special laws in violation of article III, section 11(a)(9), because they benefit special groups, the lenders who operate under the exception, and that, therefore, the loan obtained by her from the Bank was usurious. She states that the purpose of the usury law is to protect the borrower from unconscionable lenders and the validity of the classification created by the challenged statutes should be tested in light of this purpose. Analyzing the amount of interest which may be charged by various lenders including small loan companies, credit unions, industrial savings, and savings associations under the general statutory scheme, she submits that the amount of interest permitted to be charged for the same amount of loan depends upon who the lender is and not upon the character of the borrower, the amount of loan, or security pledged. She contends that this statutory scheme has as its purpose the benefit of certain lenders and not the protection of the borrower and that these exceptions are simply special laws. She asserts that the legislature can classify by the type of borrower, type of loan, or amount of loan but cannot constitutionally classify according to the type of lender.

In response, The Second National Bank argues that these statutory exceptions are not special laws in the prohibited constitutional sense since they operate uniformly throughout the State of Florida. It contends that this state has for years permitted banks and other regulated lenders to charge interest on smaller loans at rates greater than ten percent per annum. Relying on the following definition of special law: "A statute which relates to per-

sons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special," it contends that the laws in question are general laws. Reciting that this Court has long recognized the authority of the legislature to create different classifications of lenders, rates, and limits in regulating usury, it states that the legislature has reasonably classified regulated lenders and that Cesary has failed to carry her burden of proof to show otherwise. It maintains that different types of credit transactions involve different types of risks and different costs, that small loans involve greater risk and cost than commercial loans to an established business, that revolving charge accounts of credit card plans involve more risk than a loan of $20,000 to a bank's regular customer. It submits that the subject legislation is a valid and constitutional balancing of the need for reasonable, convenient credit, the need to protect the borrower, costs of credit arrangements, the risk of nonpayment, the nature of the lender's business, and the extent of existing government regulation.

We concur with the rationale of the trial court and agree with Second National Bank that the classifications created by the legislature through enactment of sections 687.031 and 656.17(1) are reasonable and that these laws are general laws which operate uniformly throughout the state upon these classifications.

Although there is no definition of general or special law in the constitution,[3] this Court in *Bloxham* v. *Florida Central & Peninsular Railroad*, 35 Fla. 625, 732-3, 27 So. 902, 924-25 (1895), explained what is meant by special law as used in the context of article III, section 11, as follows:

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3. Article X, section 12(g), Florida Constitution, merely provides: " 'Special law' means a special or local law."

> "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition." It might be that the railroad of the complainant is the only property affected by the act. Such a state of affairs would not make it a special law. Speaking upon a similar contention, this court has also quoted with approval, in the case of Ex parte Wells, supra, from the supreme court of New Jersey, the following language: "A law so framed [i.e. general in its terms] is not a special or local law, but a general law, without regard to the consideration that within the state there happens to be but one individual of the class, or one place where it produces effects." It has also been said, as applied to statutes, that the word "general," as distinguished from "special," means all of a class, instead of part of a class. 23 Am. & Eng. Enc. Law, p. 148, and authorities cited. In the case of McAunich v. Railroad Co., 20 Iowa 338, it is said, speaking of statutes of this character: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation."

The uniformity of operation throughout the state required by this constitutional provision does not mean universality of operation over the state. Reasonable classification as to subject matter is permitted. *Cates* v. *Heffernan*,

154 Fla. 422, 18 So.2d 11 (1944). Justice Terrell in *Cantwell* v. *St. Petersburg Port Authority*, 155 Fla. 651, 653, 21 So.2d 139, 140 (1945), explained:

> A law does not have to be universal in application to be a general law. Laws relating to the location of the capital of the state, the state university, the state prison farm, the hospital for the insane and other state institutions are local in character but general in application and are regarded as general laws. The act under consideration is easily within this class.

"Classification" is the grouping of things because they agree with one another in certain particulars and differ from other things in those same particulars. *Anderson* v. *Board of Public Instruction*, 102 Fla. 695, 136 So. 334 (1931). This Court has ofttimes recognized the wide discretion of the legislature in formulating classifications when establishing regulations for the public welfare but has also acknowledged that statutory classifications must be reasonable and must be based upon some difference bearing a reasonable and just relationship to the subject matter regulated. *Carter* v. *Norman*, 38 So.2d 30 (Fla. 1948); *State ex rel. White* v. *Foley*, 132 Fla. 595, 182 So. 195 (1938). A statute which relates to subjects, persons, or things as a class, based upon proper differences which are inherent in or peculiar to the class, is a general law. *State ex rel. Gray* v. *Stoutamire*, 131 Fla. 698, 179 So. 730 (1938).

The determination of the maximum amount of interest which may be charged for the use of money loaned is within the police power of the state, and the details of the legislation and exceptions to be made rest within discretion of the state legislature. *Griffith* v. *Connecticut*, 218 U.S. 563 (1910). When dealing with usury questions and classifications established by the legislature relating thereto, the legislature has a great deal of discretion, and its classifications will not be disturbed unless clearly unconstitutional. *Edwards* v. *State*, 62 Fla. 40, 56 So. 401 (1911). The legislature enacted the usury laws to remedy an existing evil, and it has the authority to classify regulatory enactments with reference to degrees of evil. *Beasley* v. *Cahoon*, 109 Fla. 106, 147 So. 288 (1933).

A party who challenges the classification of a statute has the burden of proving that the classification therein does not rest upon any reasonable basis and is therefore arbitrary. *Anderson* v. *Board of Public Instruction, supra.* Cesary failed to show that the grounds justifying the particular classifications created by the legislature for exceptions to the general law governing interest and usury are unreasonable.

The classifications of lenders created by sections 687.031 and 656.17(1) have a basis in real differences of conditions affecting the subject matter regulated. In establishing these classifications, the legislature considered the need for convenient, reasonable credit for as broad a group of borrowers as possible; the need to protect necessitous borrowers from overreaching "loanshark" type lenders; the costs of different credit arrangements, including substantial bookkeeping and computer costs involved in smaller loans; the risk of nonpayment; the nature of the lender's business and the degree of existing government regulation of that business; and the nature and needs of the borrower. For each classification of lender, the legislature has established a particularized regulatory procedure relating not only to the allowable interest rates but also to the type of security which may be taken, the length of terms over which repayment can be made, the charges and costs which may be assessed, and the penalties to be imposed if any of the regulatory provisions are violated.

Accordingly, we answer the certified questions in the negative. Neither section 656.17(1) nor section 687.031 violates article III, section 11(a)(9), Florida Constitution.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ.,

Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Certified Question from the United States Court of Appeals, Fifth Circuit—Case No. 76-1515

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In the Supreme Court of the United States

No. 78-1227

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

vs.

PERRY L. DAVIS and BURMA L. DAVIS, his wife,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

For the convenience of the Court and in the interest of brevity, the Respondents, Perry L. Davis and Burma L. Davis, his wife, will be referred to jointly in this Brief as Davis. The Petitioner, Ellis National Bank of Tallahassee, a National Banking corporation, will be referred to in this Brief as the Bank.

JURISDICTIONAL GROUNDS FOR PETITION FOR CERTIORARI

It is elementary that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The only case which has been found which would possibly lead to a construction of 12 U.S.C., §86 different from that set forth in the Florida First District Court of Appeal in the case sub judice is *Cronkleton* v. *Hall*, 66 F.2d 384 (8th Cir. 1933). Rule 19 of the Supreme Court Rules indicates the character of reasons which the Court considers as follows:

> Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

Respondents assert that *Cronkleton* is not in accord with past decisions of this Court, such as *First National Bank of Lake Benton* v. *Watt*, 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed. 475 (1902) and its progeny.

Though the Supreme Court has never decided the specific issue which Petitioner raises, Respondents submit that the statute is clear when considered in conjunction with the purpose of the statute, as discussed *infra*, and that the decision of the Florida First District Court of Appeal in this case is in accord with the reasoning of all the opinions rendered by this Court, including *First National Bank of Lake Benton* v. *Watt*, *supra*, and its progeny.

Thus, Respondents respectfully submit that Petitioner has failed to show any special or important reasons justifying the invocation of this Court's review on certiorari.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is the interpretation of the penalty provision of Title 12, U.S.C., Section 86. The District Court of Appeal of Florida, First District, held that the Statute requires a bank that has stipulated that it knowingly employed a manner of computation which it knew would produce more interest than the maximum legal rate to pay as a penalty twice the amount of usurious interest paid.

ARGUMENT

The basic issue set forth by Petitioner in the Petition for Certiorari is the extent of the penalty due a debtor when a national bank has violated 12 U.S.C., Section 86 of the National Bank Act by charging usurious interest. Respondents assert that the statutory language, when considered in conjunction with the purpose of the legislation, is so unambiguous that the Petition for Certiorari is not logically supportable and, thus, the Petition for Certiorari should be denied.

12 U.S.C., Section 85 incorporates the lawful rate of interest of the state where the national bank is located. In the case at bar, the state trial court found the loan to be usurious. (See Petition for Certiorari, pages A-1 through A-5). The Florida First District Court of Appeal affirmed. (See Petition for Certiorari, pages A-6-A-18). The Supreme Court of Florida denied certiorari. (See Petition for Certiorari, page A-19). Judge Boyer of the

Florida First District Court of Appeal in denying the Petition for Rehearing in that court stated:

> Sub judice, on the other hand, the bank *stipulated* that it knowingly employed a manner of computation which it *knew* would produce more interest than the maximum legal rate. (Emphasis by the court).

(See Petition for Certiorari, pages A-18, A-4). This was flagrant usury in violation of the National Bank Act. When the petitioner admitted that it knowingly charged interest at an illegal rate, it subjected itself to the penalty provisions of 12 U.S.C., Section 86 which clearly state that the entire interest on a usurious loan shall be forfeited and, if interest has been paid the debtor is entitled to recover back twice the amount of the interest thus paid.

Petitioner claims that the statute means twice the interest paid on individual payments in which interest at an unlawful rate was charged. Such a construction is *clearly* contrary to the intent of the statute. *See generally, First National Bank of Lake Benton* v. *Watt,* 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed. 475 (1902) (the proper penalty is twice the amount of the entire interest illegally exacted). Arguments have been made in the past that interest payments for purposes of the penalty provisions should be divided between legal and illegal interest payments. For example, if a 10% rate was lawful and an 11% rate was charged, the argument was that the penalty under 12 U.S.C, Section 86 was twice the illegal interest paid, i.e., twice the one percent difference between 10% and 11%. Such an argument was put to rest by this Court in *First National Bank of Lake Benton* v. *Watt, supra.* In the example it is not reasonable to consider the 10% legal and the 1% illegal, inasmuch as the entire interest exacted is illegal and usurious. Similarly, the "legal interest versus illegal interest" distinction is not reasonable

with respect to individual payments. If interest was charged at an unlawful rate then the interest on the loan is usurious and the entire loan is thereafter tainted with usury. The debtor may recover from the national bank twice the amount of interest thus paid. The same rationale applies to a loan made at a lawful rate but in which the creditor requires the debtor to pay certain charges which effectively push the rate into the unlawful category. The creditor would be subject to a penalty of twice the amount of interest paid, not twice the amount of the required charges which pushed the effective rate over the lawful rate. *See generally, e.g., Panos* v. *Smith,* 116 F.2d 445 (6th Cir. 1940). Such arguments are cognizable as attempts to evade the clear intent of the statute.

The first sentence of 12 U.S.C., Section 86 is unambiguous:

> The taking, using, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.

That first sentence requires a forfeiture of the *entire* interest on the *entire loan* on which one takes or receives a usurious rate of interest. In the case at bar, the parties have stipulated and the court has adjudicated that a usurious rate was taken and received. If the second sentence is construed to provide anything other than a double recovery of the interest paid, then the statute would be inconsistent. While the creditor must forfeit the entire interest the debtor would only recover twice the amount of interest paid on individual payments which were calculated at an unlawful rate, with the result that the debtor could not recover interest which the creditor had forfeited.

Such a result is unreasonable and contrary to the intent of the statute.

It was obviously the purpose of the statute to prevent national banks from exacting excessive and illegal interest. The penalty imposed is for the purpose of preventing violations of the law, and consists of a sum of twice the amount of interest paid. The penalty was doubtless intended by Congress to reimburse the debtor for the cost and expenses of litigation and to discourage violations of the law by making it more profitable for banks to obey the law than to violate it. When considering the purposes of the statute, the provisions of 12 U.S.C., Section 86 are absolutely free from ambiguity.

With regard to petitioner's "Supplement to Petition for Certiorari" the law in Florida is clear that, generally, the question of usury in a contract is to be determined by the law in force when the contract is executed. *Holland* v. *Gross*, 81 Fla. 644, 89 So.2d 255 (1956); 33 *Fla.Jur.*, Usury, Section 7. Thus, even if it were true that the substantive law of the State of Florida has changed, Petitioner's argument that the loan is no longer usurious is of no avail.

However, the substantive law of the State of Florida has not changed and 12 U.S.C., Section 85 is basically the same statute that has been in effect for more than a century. The bottom line in the instant case is that petitioner has waived its argument that it falls within an exception to the usury statute by failing to assert it as an affirmative defense.

With regard to affirmative defenses, *Trawick's Florida Practice and Procedure* (1978), Section 11-4, states:

> In addition to the responses in an answer, the pleader must assert any affirmative defenses that he has to each cause of action alleged in the preceding pleading. An affirmative defense is one that wholly or partly avoids the cause of action asserted by the preceding pleading by new allegations that admit part or all of the cause of action, but avoids liability because of a legally sufficient excuse, justification or other matter negating the alleged breach or wrong.

See Florida Rules of Civil Procedure 1.100(d), 1.140(b). The law in Florida is clear that an affirmative defense that is not pleaded is waived. *Fink* v. *Powsner*, 108 So.2d 324 (Fla. 3d D.C.A. 1959); *Trawick's Florida Practice and Procedure* (1978), Section 11-4 at page 175.

It is obvious that Petitioner's assertion that the loan falls within some exception to the Florida usury statute is an affirmative defense to Davis' counterclaim for usury. If applicable, such a defense would avoid the bank's liability inasmuch as the defense would constitute a legally sufficient excuse or justification for charging the excessive interest rate. At this late date, however, petitioner attempts to argue the affirmative defense in a supplement to its Petition for Certiorari. It *failed to assert* the statute, 12 U.S.C., Section 85, at the trial court level, at the appellate level, in its Petition for Certiorari to the Supreme Court of Florida, in its Petition for Certiorari to this Court, but now asserts it in its Supplement to Petition for Certiorari. It is clear that Petitioner waived its affirmative defense when it failed to plead it at the state trial-court level.

Nevertheless, Petitioner asserts that it is exonerated by *Cesary* v. *The Second National Bank of North Miami*, (Supplement to Petition for Certiorari, pages SA-20 through 24). Such logic is difficult to perceive. In *Cesary*, the defendant *specifically asserted* its affirmative defenses in its answer to the plaintiff's complaint and *alleged the*

requisite facts and elements to place the loan within an exception to the Florida usury statute. (See Supplement to Petition for Certiorari, page SA-10). *The record is in this case totally void of any factual allegations which would place the loan involved in this case within any exception to the usury statute.*

Furthermore, petitioner claims that *Cesary, supra,* coupled with *Cesary* v. *The Second National Bank of North Miami,* ..... So.2d ..... (Fla. 1979) (Supplement to Petition for Certiorari, pages SA-27 through 36) drastically changed the underlying substantive law of the State of Florida. (See Supplement to Petition for Certiorari, page SA-6). This analysis is puzzling. The Florida Supreme Court on February 1, 1979, merely said that the exceptions to the Florida usury statute were not unconstitutional under the Florida Constitution. The decision of the United States District Court for the Southern District of Florida was rendered on December 22, 1975, and was based on its findings that under the provisions of the National Bank Act, the bank in that case could charge interest at rates permitted by Florida law to any state chartered or licensed lending institution, pursuant to such statutes. The affirmative defense in that case, however, was not a novel theory. The District Court, on October 22, 1975 (Supplement to Petition for Certiorari, page SA-16) stated:

> (b) The United States Comptroller of the Currency has by Interpretive Ruling 7.7310 stated that a national bank may charge interest at the maximum rate permitted by state law to any competing state chartered or licensed lending institution. This ruling has been followed by the courts. *Northway Lanes* v. *Hackley Union National Bank and Trust Company,* 334 F.Supp. 723 (1971), affirmed 464 F.2d 855 (3d Cir. 1972); and *Commissioner of Small Loans* v. *First National Bank,* 300 A.2d 685 (Court of Appeals, Maryland, March 1, 1973).

See, e.g., Hiatt v. *San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), cert. den. 87 S.Ct. 323, 385 U.S. 948, 17 L.Ed.2d 227, rehearing den. 87 S.Ct. 702, 385 U.S. 1021, 17 L.Ed.2d 560; *First National Bank in Mena* v. *Nowlin,* 374 F.Supp. 1037 (E.D. Ark. 1974), affirmed 509 F.2d 872 (8th Cir. 1975).

Concisely stated, the petitioner chose neither to assert the affirmative defense nor to allege the requisite factual elements with regard to any exception to the usury statute. It is barred from doing so now.

Respondents submit that the statutory language when considered in conjunction with the purpose of the legislation, is so unambiguous that the Petition for Certiorari is not logically supportable and, thus, the Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, CHARLES J. FRANSON, attorney for Perry L. Davis and Burma L. Davis, his wife, Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of March, 1979, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the several parties thereto as follows:

On Ellis National Bank of Tallahassee, a National Banking corporation, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

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